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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the writ	10
Conclusion	15
Appendix	1a

CITATIONS

Cases:

Accardi v. *Shaughnessy*, 347 U.S. 260..2, 3, 9, 11, 12, 13, 14
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134..... 12
Marcello v. *Bonds*, No. 145, this Term....11, 12, 13, 14, 15

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, PETITIONER

v.

UNITED STATES EX REL. JOSEPH ACCARDI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Edward J. Shaughnessy, as District Director of the Immigration and Naturalization Service for the New York District, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the order of the District Court for the Southern District of New York dismissing respondent's petition for habeas corpus.

OPINIONS BELOW

The opinions in the court of appeals (App. 1a-21a) have not yet been reported. The findings and

conclusions of the district court appear at pages 188-190 of the record.

The prior opinion of this Court in this cause is reported at 347 U.S. 260.

JURISDICTION

The judgment of the court of appeals was entered January 7, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon the unchallenged testimony of members of the Board of Immigration Appeals that they understood that the inclusion of respondent in the Attorney General's program for deporting undesirable aliens meant only that they were to give priority to his case, the court below properly applied this Court's decision in *Accardi* v. *Shaughnessy*, 347 U.S. 260, in presuming that the mere existence of such a program prevented the Board from exercising its independent discretion on respondent's application for suspension of deportation.

STATEMENT

In its prior opinion in this cause, *Accardi* v. *Shaughnessy*, 347 U.S. 260, this Court ruled that respondent's allegation, in his petition for habeas corpus seeking review of an order of deportation, that the denial of his application for suspension of deportation by the Board of Immigration Appeals had been caused by the prejudgment of his case by the Attorney General, who previously and publicly had described him as an undesirable alien,

raised an issue of fact which required a hearing. The Court pointed out that "proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, 'We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred' " (347 U.S. at 267). The Court, after noting that the petition for habeas corpus charged the Attorney General with dictating the decision of the Board, and that the offer was to prove such fact, 347 U.S. at 267, said, at page 268:

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. * * * Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.
>
> If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to sus-

After the Supreme Court remanded, pursuant to its opinion in Accardi v. Shaughnessy, 347 U.S. 260, the case went to trial, on a new petition for a writ of habeas corpus before a judge (without a jury). The judge made an order dismissing the writ. From that order relator appeals.

FRANK, *Circuit Judge:*

1. We shall assume familiarity with the facts stated in our previous opinion, 206 F. (2d) 897, and in the opinion of the Supreme Court, 347 U.S. 260. We do stress one fact: The particular kind of discretionary relief sought by Accardi was suspension of deportation, pursuant to Section 19(c) of the Immigration Act of 1917, as amended in 1948, which, so far as pertinent, provides:

> "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more, and is residing in the United States upon July 1, 1948." 8 U.S.C. (1946 ed. Supp. V) Sec. 155(c).

> pension, but at least he will have been afforded that due process required by the regulations in such proceedings [emphasis in original].

Following the decision by this Court, the district court issued a writ of habeas corpus on May 10, 1954 (R. 8-9). After the filing of a return to the writ, supplemented by affidavits, a traverse, interrogatories and responses thereto (R. 10-55), District Judge McGohey held a hearing on June 23, 1954 (R. 84), at which relator attempted to prove his allegations. The oral testimony at this hearing (R. 84-133) was supplemented by a pretrial deposition of former Attorney General McGranery (R. 134-145) and post-trial depositions of members of the Board of Immigration Appeals (R. 56-72) and Mr. Horan, a Special Assistant to the Attorney General (R. 73-83). The pertinent evidence adduced may be summarized as follows:

After former Attorney General McGranery held a conference with F.B.I. Director Hoover in which he asked for the names of racketeers and undesirables who had obtained their citizenship through fraud or were subject to deportation, he called a meeting of officials of the Department of Justice, and a Mr. Donegan was placed in charge of coordinating the investigation and preparation of charges in these deportation matters (R. 138-139). Recommendations for adding names to the Attorney General's deportation program could come from the Immigration and Naturalization Service, the F.B.I., the Criminal Division, or the Deputy Attorney General's office (R. 75). These units

2. Printed in the Appendix to this opinion are certain public announcements of the Attorney General, consisting of newspaper reports of interviews with him and of "press releases" issued by him. They were not called to our attention on the previous appeal. But they were submitted by the government to the Supreme Court. Apparently the Supreme Court took judicial notice of them, since it referred to and relied upon them in its opinion. These data were received in evidence at the subsequent trial and are now in the record before us. They are significant because of the following portions of the Supreme Court's opinion:

> "We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of 'unsavory characters' whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the 'Attorney General's proscribed list of alien deportees.' To be sure, the petition does not allege that the 'Attorney

were represented on the Coordinating Committee of which Mr. Donegan was chairman and Mr. Horan, his assistant (R. 76).

Mr. McGranery stated that his program was "deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities" (R. 136-137). He explained that there was no static list of potential deportees, but that the list was constantly changing from day to day as the records were studied (R. 135-136).

Upon the recommendation of the Immigration and Naturalization Service, relator's name was placed on the list on November 19 or 20, 1952 (R. 74, 77-79, 81-82). Mr. McGranery stated that an F.B.I. report and his own investigation indicated that relator was a racketeer, and that was the reason he took steps to deport him (R. 141).

Thomas G. Finucane, chairman of the Board of Immigration Appeals at the time relator's case was before it, testified as follows:

He first became aware of the Attorney General's program, as announced in the official press release of the Department of Justice on October 2, 1952 (R. 148-149), by reading of it in the newspapers and then receiving a copy of the press release (R. 103-104). He probably circulated this press release among the other Board members as the normal practice, although he had no specific recollection on this (R. 104-105).

About two or three months after the announcement, Mr. Rawitz of the Immigration Service asked whether the Board could expedite the consideration of cases under the program. Mr. Finucane

> General ordered the Board to deny discretionary relief to the listed aliens.' It would be naive to expect such a heavy-handed way of doing things. . . . If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right."

3. The government contends that, reasonably construed, those published utterances of the Attorney General could mean no more than that the hearings of persons included in his "program" should be "expedited." The government, explicitly and repeatedly, advanced that same contention in its brief in the Supreme Court.[1] It seems obvious that the Supreme Court rejected it.

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[1] The following are excerpts from that brief:

Petitioner's "case rests entirely upon the fact that officials of the Department of Justice have (1) performed their duty to bring deportation proceedings against aliens residing here illegally, (2) *expedited cases* of aliens deemed to be particularly undesirable, (3) believed petitioner to belong to this class, and (4) made public statements describing these activities. . . ."

"There is nothing extraordinary, therefore, in the fact that efforts should be made by the Department of Justice to *expedite proceedings* against deportable aliens whose presence here is deemed particularly undesirable. Nor is it surprising that *public statements* . . . should be made *describing these efforts.*"

Other similar cases "were *expedited* under the Attorney

stated that the Board would do so. (R. 107.) The procedure adopted was for Rawitz to give the Board's calendar clerk a written memorandum showing the names of cases within the program, but in some instances oral communications may have been received. There was no written communication to the Board to expedite the hearing of relator's case, and Mr. Finucane and other Board members did not recall any oral request for this. (R. 109-110.) Mr. Finucane did not understand the program to be one for intensifying efforts looking toward deportation and denaturalization of subversives and racketeers, but rather to intensify efforts in the prosecution of such cases (R. 111). Neither Mr. Donegan nor Mr. Horan of the Department of Justice ever called Mr. Finucane regarding the program (R. 111-112).

Mr. Finucane testified that when relator's case was decided, no press release or order of the Attorney General was before the Board members or discussed by them, and that their decision was "free and undictated" (R. 113-114). He stated that the Board members did not receive any instructions from the Attorney General or any of his subordinates as to how relator's case should be decided on its merits (R. 126). At the time of the Board's decision on April 3, 1953, Mr. Finucane was not even aware that relator's name was on the list, since there was no written communication to the Board so stating, and he stated that none of the Board members had a recollection of this fact (R. 127, 128). No members of the Board or its staff had anything to do with the preparation of the De-

4. If more were needed as to the meaning of the Attorney General's statements and "releases," we now have the testimony of the then Attorney General, McGranery, which amply supports the Supreme Court's interpretation.[2] We must take it, then, that the Attorney General's clearly stated intention was to deport anyone named by the Attorney General as within his program.

General's program to insure enforcement of the deportation laws against aliens believed to be especially undesirable."

(The emphases in the above quotations are added.)

[2] The following are excerpts from his deposition testimony:

"Q. Were you the Attorney General of the United States on October 2, 1952? A. Yes.

"Q. Did you hold a press conference in your office in Washington, D. C. on that date? A. I did.

"Q. Does the official press release of the Department of Justice contain the announcement which you made on that date? A. A copy of the release is here, and it does.

"Q. Do the news items of October 3, 1952 in the Washington Star, The Washington Post and the New York Times, accurately reflect your statements to the press? A. They do. . . .

"Q. When Jack Ignatius Dragna was arrested for deportation on December 8, 1952, the official press release of that day by the Department of Justice said:

> " 'The arrest, . . ., was another step in his denaturalization and deportation program deemed at ridding the nation of undesirable aliens engaged in racketeering and other criminal activities.'

A. You can underline that 'undesirable aliens.'

"Q. Did the aforesaid quotation accurately reflect your program? A. That is right. That reflects accurately my program. . . .

"Q. At the time your press conference, according to the newspaper accounts, you had included within your program such persons as Frank Costello, Nicholas Circella, William Lias, Hyman Shomberg, Alfred Polizzi, Harry Voiler and Anthony Volpe. The Government had admitted that Joseph Accardi was within your program. Do you recall whether

partment of Justice press release on April 3, 1953 (App. 16a), the same date as the Board's decision (R. 114-115, 149-150).

In the collective deposition of the other four Board members, they testified that at no time did they receive any communication relative to relator's case from the Attorney General or any of his subordinates as to how the case should be decided on its merits (R. 70). In response to the question as to whether on the date of the Board's decision the members knew whether relator's case was within the Attorney General's program, one said that he had no such knowledge; the second, that he may have known but could not say; the third, that although he could not say with definiteness, it was his opinion that he knew relator was on the list; and the fourth, that she had no recollection that she knew relator was on the list (R. 69). The Board members testified that, even if they had known that relator's name was included in the program, this would not have influenced their decision on the merits and they would not have construed this as dictation by the Attorney General for an adverse decision (R. 72). The Board members did not construe any press release by the Attorney General relative to an alien whose case was pending before them in 1952 or 1953 as an indirect suggestion or hint from the Attorney General that they should decide the case against the alien, apart from the contents of the record (R. 71).

Testimony in the deposition of former Attorney General McGranery was to the effect that the Board never received a list of the persons on his

program, but received the material furnished to it in individual cases. He denied ever indicating to the Board, either directly or indirectly, his feelings as to how its members should determine a case pending before it. (R. 142-143.)

No proof was offered in support of respondent's earlier contention, noted by this Court (*supra*, p. 3), that the Commissioner of Immigration had told his attorney that "We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred."

The District Court, in dismissing the writ of habeas corpus, held that relator had failed to prove his charge (R. 187-190). Pertinent findings by the District Court are set out in the margin.[1]

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[1] "3. When an appeal by any alien of either of the classes described reached the Board of Immigration Appeals, the Chairman of that Board was notified either orally or in writing that such alien was one of those embraced in the Attorney General's program. This notification was sometimes passed on to other Board members, sometimes not. The purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal.

"4. Neither such notification nor the existence of the program was considered by the Chairman or by any Board member as a direction by the Attorney General, or even as a hint by him, to decide an appeal adversely to an alien. Moreover, these matters were given no weight by the Board in their deliberations.

* * * * *

"7. The Board members and each of them who considered [relator's] appeal reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him.

"8. The Board's adverse decision on [relator's] appeal is adequately supported by the evidence before the Board. * * *

On appeal, the judgment was reversed and remanded by the Court of Appeals for the Second Circuit, Judge Harlan, dissenting (App. 20a). Judge Frank of the majority read this Court's prior opinion as holding that respondent was entitled to a new hearing if he could prove that he was one of the persons to whom the Attorney General's statements and press releases referred, that a majority of the Board knew that fact, and that they were affected by it when they denied him discretionary relief (App. 6a). Accepting as a fact that the Board members consciously believed, when they testified, that the Attorney General's statements amounted to no more than a direction to give priority to a case on the program, he found it impossible to believe that, in determining respondent's application for discretionary relief, they were not unconsciously influenced by their knowledge that his name was included in the program (App. 8a). Accordingly, he ruled that respondent was entitled to be discharged unless accorded a new hearing before the Board under the new instructions issued by the present Attorney General on April 23, 1954, after this Court's prior decision in the case (App. 14a-15a).[2]

"* * * I find no rational basis for disbelieving the witness, and relator's inferences are clearly refuted by the testimony which is fully accepted." (R. 189, 190.)

[2] These instructions, issued shortly after this Court's decision in *Accardi* v. *Shaughnessy*, 347 U. S. 260, stated in effect that the Board of Immigration Appeals should exercise its independent judgment and discretion in making its decisions, without prejudgment and without being influenced by the Attorney General's program. (R. 17-18.)

Judge Clark, concurring, was of the view that it was unnecessary to speculate about the effect of the Board's knowledge of the list on the exercise of its discretion; that the prior opinion of this Court merely required respondent to prove, as he had, that there was a list, that his name was on it, and that such fact was known to the Board (App. 18a-19a). He concluded that such facts "create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so, whether the program was one of expedition or one of deportation, for in either case relator was being singled out as an alien whose imminent departure was deemed desirable by the Attorney General." He also expressed doubt as to whether the Attorney General's instructions of April 1954 constituted a withdrawal of the list (App. 19a). Judge Harlan, dissenting, thought this Court had held that the issue on remand was "whether the Board's denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General"; that the trial judge's finding that the Board members reached their decision "free from any dictation or suggestion by the Attorney General" or anyone acting for him was not clearly erroneous, and hence that the order of the District Court should be sustained (App. 20a 21a).

REASONS FOR GRANTING THE WRIT

The question involved in this case is whether, despite the unchallenged testimony of the members

of the Board of Immigration Appeals that the inclusion of Accardi in the Attorney General's program for deporting undesirable aliens meant only that the Board should expedite his deportation proceeding, the existence of such a program supports a presumption of bias in the Board. This question is already before this Court in *Marcello* v. *Bonds*, No. 145, this Term, since Marcello was also included in the Attorney General's program and he contends that that fact alone establishes that the Board did not exercise independent discretion in his case. We submit that the decision below erroneously applied this Court's decision in *Accardi* v. *Shaughnessy*, 347 U.S. 260, and should be reviewed by this Court, along with the *Marcello* case, so as to make clear the proper disposition of a substantial number of deportation cases.

1. We interpret the decision of this Court in *Accardi* v. *Shaughnessy, supra*, as did Judge Harlan dissenting in the court below, as holding that Accardi was entitled to a rehearing before the Board of Immigration Appeals if he could prove, not only that he was included in the Attorney General's deportation program and that the Board was aware of that fact, but also that these circumstances prevented the Board from exercising its independent discretion in determining Accardi's application for suspension of deportation. Notwithstanding unchallenged testimony in the District Court, following this Court's decision, that the members of the Board understood that the inclusion of Accardi in the program meant only that

the Board should expedite or give priority to the determination of his and other program cases, the majority of the court below have held that there is a conclusive presumption that the existence of such expediting instructions created in the Board a conscious or unconscious bias which prevented it from exercising independent discretion on his application. We submit that this unprecedented presumption of bias on the part of administrative officers is clearly erroneous, as a matter of law, in view of the Attorney General's exclusive discretion to determine the order in which deportation cases shall be heard. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145-146. That is, we contend that an instruction by the Attorney General to the Board to expedite and give priority to a particular class of cases cannot support a presumption that the Board is therefore disabled by bias from making independent decisions on the merits of such cases.

2. Prior to this Court's decision in *Accardi* v. *Shaughnessy, supra,* the Board of Immigration Appeals had heard and decided about 40 cases included in the Attorney General's deportation program. *Marcello* v. *Bonds,* No. 145, this Term, typifies these cases in that it is alleged, without denial, that Marcello was included in the Attorney General's deportation program. Marcello, in the brief filed on his behalf by the same counsel who represents the respondent here, argued that such fact alone established bias. The government argued in opposition to the granting of certiorari in

Marcello that his mere inclusion in the program did not establish prejudicial influence upon the Board and that he had made no offer to prove his allegations of such influence. Realistically, we must assume that upon a hearing, such as was held in *Accardi* upon remand, it would also appear that the Board was aware that Marcello was included in the program and that the Board understood this to mean that it should give priority to his case. Indeed, we believe that these circumstances could be shown in every case included in the Attorney General's program and decided by the Board before this Court's decision in *Accardi*.

On April 23, 1954, following this Court's *Accardi* decision, the Attorney General issued instructions to the effect that the Board of Immigration Appeals (and special inquiry officers of the Immigration and Naturalization Service) should exercise an independent judgment and discretion in deportation cases without regard to the existence of the deportation program. Since these instructions simply confirm the testimony of the Board members in *Accardi* upon remand, the decision below throws doubt upon the validity of the decisions of the Board in a substantial number of additional cases decided under these instructions.

Thus, the proper construction of this Court's decision in *Accardi* v. *Shaughnessy, supra,* is of general and immediate importance. Moreover, the difference of views in the court below, even among the judges who make up the majority, in itself establishes the need for further clarification. For the

and he grounded his decision primarily on tha finding, saying that he could see "no rationa ground for disbelieving the witnesses" on tha score.

This finding, based on that testimony, canno stand up. We accept it as a fact that the Boar members *consciously* believed, when they testifie that the Attorney General's statements amounte to no more than a calendar order (i.e., a directio to give preference, merely in point of time, to con sideration and decision of such cases), and tha beyond that, those statements did not have any ef fect on the Board's decisions. But it is incredible human nature being what it normally is, that th Attorney General's statements—as interpreted b the Supreme Court and the former Attorney Gen eral—did not *unconsciously* influence the Boar members so that they felt obliged not to exercis their discretion and, without doing so, to decid against Accardi. Any other finding involves re liance on so remarkable a degree of improbabilit as to be untenable.

Yet the rejection of the finding does not impl any challenge of the intelligence of integrity o

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man or by any Board member as a direction by the At torney General, or even as a hint by him, to decide a appeal adversely to an alien. Moreover, these matter were given no weight by the Board in their deliberations . . . The Board members, and each of them who consid ered Accardi's appeal, reached their individual and col lective decision on the merits, free from any dictation o suggestion by the Attorney General or any of his assist ants or anyone else acting or purporting to act for him.

majority below is not in accord as to whether the new hearing which they have ordered may proceed under the directions of the present Attorney General issued April 23, 1954.

3. While *Marcello* v. *Bonds* presents the issue as to the precise requirements of this Court's *Accardi* decision, we believe that it is desirable from every point of view to clarify the legal significance of the Attorney General's program in the light of the present record in *Accardi*, rather than in *Marcello* alone. The instant case is the one in which the facts as to the operation of the program are fully developed by sworn testimony, so that a decision can be based on facts and not on speculation. It is manifest that the facts developed as to the understanding of the program by the members of the Board of Immigration Appeals are not peculiar to this case, but affect every case on the program. A decision by this Court in the instant *Accardi* case will therefore be authorative as to all cases on the program, in a way in which a ruling on the bare allegations in *Marcello* cannot be, and probably will also control the disposition of *Marcello*.

the Board members. One need not turn to the works of Freud and his disciples to learn that unconscious influences importantly affect the memory of honest men; such teachings will be found in the writings of Plato, Aristotle, Euripides, Dante, Montaigne, Shakespeare, Moliere, Pascal, Pope, Byron, Dr. Oliver Wendell Holmes and his sagacious son, to say nothing of novels since Fielding to the present. Indeed, the courts have long recognized that, stimulated by interest, pride or other motives, thoroughly honest and intelligent witnesses may tell unbelievable stories. The books are full of comments like these: "No class of men know better than judges, how much interest may unconsciously warp an honest mind."[46] "Our memories are easy and ofttimes unconscious slaves to our wills."[46] Accordingly, a court may discredit the testimony of a witness "without casting any shade of doubt upon his character."[47] "The statements of some are unconsciously affected by their wishes, hopes or prejudices."[48] Judges have spoken of the "ease with which honest witnesses can persuade themselves that they remember some bygone circumstance which they are ingeniously induced to think that they remember";[49] of "how extremely prone persons are to believe what they wish."[47] Be-

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[46] Grant v. Bradstreet, 87 Me. 583, 609, 33 Atl. 165, 173.
[46] Thomas v. Ribble, 24 S.E. 241, 245.
[47] Fisler v. Porch, 10 N.J. Eq. 243, 245.
[48] United States v. Flint, 25 Fed. Cas. No 15,121 (at p. 1111).
[49] Hershey v. Blacksley, 33 Fed. 922, 924.
[47] Crouch v. Hooper, 16 Beav. 182, 185.

CONCLUSION

It is therefore respectfully urged that this petition for a writ of certiorari should be granted and that the cause be set down for argument together with *Marcello* v. *Bonds*, No. 145.[3]

SIMON E. SOBELOFF,
Solicitor General.

FEBRUARY, 1955.

[3] Counsel for respondent, who is also counsel for *Marcello*, has agreed to cooperate in having the case set for argument during this term of court by taking less than full time to answer this petition. If certiorari is granted in this case, the government undertakes to file its brief within a short time after the date of grant, thus giving counsel for respondent his full thirty days to reply and still making it possible for argument to be heard at the April 18 session of this Court.

cause of interest, "very honest persons (such is the infirmity of our nature) often deceive themselves without being aware of it"; they "will often give false color to a transaction, without . . . intending to speak falsely or to suppress the truth."[40] The judiciary has thus acknowledged the wisdom of the aphorism: "Memory says, 'I did this'; pride says, 'I could not have done it'; eventually pride wins."

The courts, too, have often held that a highly improbable story requires "strong corroboration,"[40a] and that "inherently improbable" testimony, not adequately explained, should be disregarded.[41] "The circumstances of a case may be such as to make" evidence "utterly incredible, although there are confident attestations in support of it," said Lord Stowell.[42] A court, remarked Judge Learned Hand, is not obliged to close its eyes "and assume a credulity which no sensible man can . . ."[43] Evidence, as to human conduct, con-

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[40] Marsh v. Tyrell, 4 Eng. Ecc. 33, 46.

See also Vreeland v. Vreeland, 48 N.J. Eq. 56, 21 Atl. 627, 630; Rogers v. Rogers, 97 Md. 573, 55 Atl. 450, 456; Thayer v. Hart, 20 Fed. 693; Hunter v. Wetsell, 84 N.Y. 549, 556.

[40a] Moore, Facts, (1898) §§ 93, 1146; Smith et al. v. Davis, C.C. 34 F. 783, 784; cf. The William Gray, 29 Fed. Cas. 1300, 1302.

[41] Quock Ting v. United States, 140 U.S. 417, 420, 11 S. Ct. 733; Gindorff v. Prince, 189 F. (2d) 897 (C.A. 2); The Dauntless, 9 Cir., 129 F. 715, 721; Fire Association v. Weathered, 5 Cir., 54 F. (2d) 779; Emanuel v. Kansas City T. & Tr. Co., 8 Cir., 127 F.(2d) 175, 180; Moore, loc.cit. §137.

[42] The Argo, 1 C. Rob. 158, 159, quoted in Moore, loc.cit. §140.

[43] Ramopa Company v. A. Gustun & Co., S.D. D.C. 278 F. 557, 559.

trary to common experience, will not be accepted.[45] The "eye of the law" will not "be blinded" by incredible statements,[46] statements "beyond the pale of credibility."[47] "The measure of proof required to establish any proposition must necessarily vary with its degree of probability,"[48] and must be strong in proportion to the degree of improbability.[49]

Pertinent here is the following: (1) In its opinion, issued on April 3, 1953, the Board said:

> "Affidavits of persons well acquainted with the alien, character investigations by the Service and the testimony of four witnesses placed

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[45] Gardner v. Gardner, 2 A.C. 723, 730, 736; Earle v. Norfolk, etc. Hosiery Co., 36 N.J. Eq. 188, 194; New York & Brooklyn Ferry Co. v. Moore, 102 N.Y. 667, 6 N.E. 293, 298; Vreeland v. Vreeland, 48 N.J. Eq. 56, 21 Atl. 627, 631; Whelen v. Osgoodby, 62 N.J. Eq. 571, 50 Atl. 692, 694; Gardner v. Weston, 18 Ia. 533, 535; Hunter v. N.Y.O. & W. R. Co., 116 N.Y. 615, 23 N.E. 9, 6 L.R.A. 246; Gurley v. Missouri Pac. R. Co., 104 Mo. 211, 16 S.W. 11, 17; Groth v. Thomann, 110 Wis. 488, 86 N.W. 178, 181.

[46] Hook v. Missouri Pacific Ry. Co., 62 Mo. 659, 63 S. W. 360, 362.

[47] Vramme v. The Ship New England, 14 Fed. Cas. 7,930, p. 852.

[48] Haworth v. Stark, C.C., 88 F. 512, 514.

[49] Murray v. White, D.C. 9 F. 562, 564; The Gratitude v. The Eutaw, D.C. 14 F. 479, 481; The El Dorado, D.C. 27 F. 762, 763; Smith et al. v. Davis, C.C., 34 F. 783, 787; Merritt & Chapman D. &. W. Co. v. North German Lloyd, D.C. 120 F. 17, 27; Morison v. Dominion National Bank, 169 Va. 191, 192 S.E. 707, 711; Moore, loc.cit. §32.

Those more impressed by Latin than English or American, are referred to the maxim, "In obscuris inspici solere quod verisimilius est, aut quod plerumque fieri solet."

APPENDIX

in this proceeding establish that the alien is considered a person of good moral character."

In a "press release" issued that same day, the Attorney General announced

"that the Board of Immigration Appeals has sustained the order of the Immigration and Naturalization Service to deport Joseph Accardi, 43, of Newark, New Jersey. The order charges that he entered the United States at Buffalo, New York, August 19, 1932, without the required immigration visa.

"Accardi, known as a New Jersey racketeer, is a native of Sicily, Italy, and brother of Samuel Accardi against whom denaturalization proceedings are pending in the Federal court at Newark. . . .

"These actions were taken under the current denaturalization and deportation program of Attorney General Brownell against top racketeers and subversives. They are the result of closely coordinated action and intensive investigation by the Federal Bureau of Investigation and the Immigration and Naturalization Service."

We have in mind, too, the Supreme Court's remarks that this Board is not an independent agency —like the Interstate Commerce Commission or the Securities and Exchange Commission—but a "nonstatutory board composed of subordinates within a department headed by the individual who for-

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 97

OCTOBER TERM, 1954

Argued November 8, 1954; Decided January 7, 1955

Docket No. 23191

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI, REALTOR-APPELLANT

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE, RESPONDENT-APPELLEE

Before: CLARK, Chief Judge, and FRANK and HARLAN, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus, McGohey, Judge. REVERSED and REMANDED.

Jack Wasserman, Washington, D. C. (Irving Radar, of Counsel, New York, N.Y.) for relator-appellant

J. Edward Lumbard (Harold J. Raby and Lester Friedman, of counsel) for respondent-appellee.

mulated, announced, and circulated such views of the pending proceedings" and that it "would be naive to expect such a heavy-handed way of doing things" as an explicit order by the Attorney General to the Board to deny the discretionary relief of suspension of deportation to any alien designated by him.

We conclude, therefore, that the Board members, in deciding against Accardi's application for such discretionary relief—i.e., suspension of deportation—were controlled by what amounted to an order from their superior so to decide. The trial judge's finding is "clearly erroneous," since, "although there is evidence to support it," we "are left with the definite and firm conviction that a mistake has been made committed." United States v. U. S. Gypsum Co., 333 U.S. 364, 395; United States v. Oregon Medical Society, 343 U. S. 326, 339; McAllister v. United States, —— U. S. —— (November 8, 1954).

9. To round out the story, it should be noted that the government advances these arguments:

(a) The Attorney General, under the regulations, may reverse any Board decision; therefore, says the government, it is absurd to believe that he gave the Board orders directing how they were to decide any particular cases. The government made this same contention in its brief in the Supreme Court.[5] As this argument did not persuade that Court, we do not consider it.

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[5] In its Supreme Court brief, the government said: "It would be a startling thing indeed . . . to suggest that the

5. We read the Supreme Court's opinion as holding this:

(a) The Attorney General's statements, reported in the press and in his press releases, "clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation," but, "to the contrary," showed that "those listed were persons whom the Attorney General 'planned to deport.' "

(b) Accardi is entitled to a new hearing before the Board—of the kind described by the Supreme Court—if at a trial in the district court he can prove that

(1) he was one of the persons to whom the Attorney General thus referred, and

(2) a majority of the Board knew that fact, and

(3) the majority was affected by it when the Board denied him discretionary relief.

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he was included before or after your announcement of October 2, 1952? A. Joseph Accardi's case was one of the earliest cases submitted, and his case was already on appeal at the time. I think now—if I am incorrect, you correct me—Joseph Accardi's case had been heard by the Hearing Commissioner before and prior to October 2, 1952.

"Q. That is correct. A. But my investigation and the record of Accardi proved him, to my satisfaction, to be racketeer. That is why I put him on there. . . .

"Q. Attorney General Brownell has stated in press releases that Joseph Accardi is a racketeer. Do you recall whether he was included within your program because you or your staff considered him to be a racketeer? A. He was one of the first. . . My investigation of Accardi indicated that he was a racketeer and that is the reason I moved to deport him."

6. The evidence leaves no doubt that Accardi was so named.

7. Was the Board informed of this fact? The trial judge so found, stating: "In accordance with the practice in such cases, notice was given to the Board that Accardi was an alien embraced within the Attorney General's program." He made this finding, despite the oral testimony of the Board's Chairman that, previous to the Board's decision, he had no such knowledge. As this finding has support in the deposition-testimony of one Board member, and as two other members, also testifying by deposition, said they could not remember whether or not they then had had such knowledge, we see no reason why we should not accept that finding.[3]

8. This leaves but one issue of fact: Was a majority of the Board members influenced by that knowledge? All the Board members testified they were not, because, they said, a notification from the Attorney General that any particular alien was within his "program" meant, to them, merely that the Attorney General desired an expeditious consideration and determination of that alien's case. The trial judge, on the basis of that testimony, found that such was the Board's understanding;[4]

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[3] The Board consists of five members.

[4] His pertinent findings read as follows:

"The purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal. Neither such notification nor the existence of the program was considered by the Chair-

(b) In several instances, says the government, the Board has granted discretionary relief to aliens whom the Attorney General had previously named as within the "program." This argument, also, the government made unpersuasively in its brief in the Supreme Court.[6] We may add that there is no evidence that, in those cases, the Attorney General had not withdrawn the names of those aliens from his "program before the Board decided in their favor." Moreover, the Board's chairman significantly testified at the trial that, in every instance where a final decision has been rendered in a case within the "program," the alien was ordered to leave the country voluntarily or to be deported, and that none of such persons was granted suspension of deportation.

10. The Attorney General, on April 23, 1954, a few days after the Supreme Court's decision came

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Attorney General found it necessary to dictate the Board's decision to spare himself the possible task of reversing a determination with which he disagreed. . . . The short answer again is that both functions—the prosecution of deportation cases and decision on applications for discretionary relief—have been entrusted to the Attorney General. The fact that he performed the first is no ground for launching an inquiry into his performance of the second."

[6] In its Supreme Court brief, the Government said: In some cases which were "expedited" under the Attorney General's program, the "Board of Immigration Appeals has affirmed orders granting" discretionary relief. "In other cases, following orders for deportation, the Board has ordered the proceedings reopened to consider further applications" for such relief. "These instances . . . illustrate that decisions in the Department of Justice to commence deportation proceedings are neither decisions in advance on deportability nor judgments in advance on the propriety of discretionary relief."

down, issued instructions that the Board should not be influenced in its decisions by his "program" but, in each case, should exercise independent judgment.

11. Accardi must be released from custody unless, within a reasonable time, the Board, under those new instructions, holds a new hearing and renders a new decision on his application for discretionary relief.[7] Although the Board has already found that he has a good moral character, he should have the opportunity at the new hearing to offer evidence that he is not and never has been a racketeer. For it may be that, in so characterizing Accardi, the Attorney General has confused him with someone else of the same name.

Reversed and remanded.

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[7] Cf. Mastrapasqua v. Shaughnessy, 180 F. (2d) 999, 1003-1004 (C.A. 2).

APPENDIX TO COURT'S OPINION

Press Reports and Press "Releases"

Appellant's exhibits Nos. 4, 5 and 6 (three newspaper clippings from the Washington Post, Washington Evening Star and New York Times) may be found in the record filed in the United States Court of Appeals on pages 161a, 163a and 165a of the Joint Appendix.

Press Reports and Press "Releases"

"For Immediate Release
Friday, April 3, 1953

"DEPARTMENT OF JUSTICE

"Attorney General Herbert Brownell, Jr., announced today that the Board of Immigration Appeals has sustained the order of the Immigration and Naturalization Service to deport Joseph Accardi, 43, of Newark, New Jersey. The order charges that he entered the United States at Buffalo, New York, August 19, 1932, without the required immigration visa.

"Accardi, known as a New Jersey racketeer, is a native of Sicily, Italy and brother of Samuel Accardi against whom denaturalization proceedings are pending in the Federal Court at Newark."

"For Release to Morning Papers of
Wednesday, May 20, 1953

"ADDRESS

By

HONORABLE HERBERT BROWNELL, JR.,
Attorney General of the United States.

". . . .

"But here are a few examples of the thousands of decisions and actions the Department of Justice may be called to make and take in a single day: . . . to initiate deportation proceedings against undesirables like Joseph Accardi. . . ."

Press Reports and Press "Releases"

"ORGANIZED CRIME
"ITS THREAT TO BUSINESS AND GOVERNMENT

"Address

"By

"WARREN OLNEY III

"Assistant Attorney General of the United States

. . . .

"Friday, October 30, 1953.

. . . .

"The second area is one in which the Department of Justice has not only primary but exclusive jurisdiction—the field of denaturalizing and deporting gangsters and racketeers, who are foreign-

born and who, because of their criminal activities, can make no claim to remain in the United States while violating its laws. . . .

"To name but a few of the nationally known hoodlums who are the objects of the program—Spinella from Florida and De Simone from Missouri have been deported—Nicolo Impostato of Kansas City, Jack Dragna of Los Angeles, Joe Accardi of New York and Joe Adonis of New York have all been ordered deported. . . ."

Press Reports and Press "Releases"

"For Immediate Release
"Friday, May 8, 1953

"DEPARTMENT OF JUSTICE

"Attorney General Herbert Brownell, Jr. announced today that a petition seeking cancellation of the naturalization of Gaetano Martino, Brooklyn, New York, has been filed in the U. S. District Court of Brooklyn.

"The move was another step in the *program for denaturalization* and/or *deportation of racketeers and others who have engaged in criminal activities.*"

CLARK, *Chief Judge* (concurring in the result).

I concur in the result reached in the majority opinion, but do not feel it necessary to explore, as it does, the underlying motivation of the Board members. What the Supreme Court required the

relator to prove he has now adequately demonstrated; namely, that there was a list as alleged, that he was on it, and that this fact was known to the Board. I do not believe that the Supreme Court required us to go beyond this to speculate about the effect of this knowledge on the exercise of the Board's discretion. That would surely be a vain task; all judges naturally and honestly believe that they are above bias. But the facts shown create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so, whether the program was one of expedition or one of deportation, for in either case relator was being singled out as an alien whose imminent departure was deemed desirable by the Attorney General.

What, then, should be the proper disposition of this case? The Supreme Court advised thus: "If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right." 347 U.S. 260, 268. I am not convinced that the Attorney General's instructions of April 23, 1954, constituted a withdrawal of the list. Since we cannot effectively control the Attorney General in the administration of his office, we can require only that at a new hearing relator should at

least have the opportunity to present evidence rebutting the Attorney General's characterization of him as a racketeer.

HARLAN, *Circuit Judge* (dissenting):

I am unable to agree with the result reached by my brethren in this case. I read the majority opinion in the Supreme Court as holding that the issue on which the relator was entitled to a hearing before the Court was whether the Board's denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General. Mr. Justice Clark said: "It is important to emphasize that we are not here reviewing the *manner* in which discretion was exercised. * * * Rather, we object to the Board's alleged *failure to exercise* its own discretion * * * (Italics in original). The language in the preceding paragraph of Justice Clark's opinion means no more, I think, than that the relator's allegations sufficiently charged "dictation" by the Attorney General, and not that the acts alleged, if proved, necessarily resulted in dictation.

The relator has had his hearing on this issue and the trial Judge has found that the Board members "reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him." That finding is supported by the sworn and unequivocal testimony of the Board members who

sat on Accardi's case—the Chairman testifying in person and the others by deposition—and I cannot regard the finding as "clearly erroneous." Nor can I agree with Judge Clark who holds, as I understand his concurring opinion, that we may accept the finding but side-step its effect. Such a result can be achieved only by giving the Supreme Court's opinion an interpretation which I do not think it will bear.

In my view, the dismissal of the writ should be sustained.

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of January one thousand nine hundred and fifty-five.

Present: Hon. Charles E. Clark, Chief Judge; Hon. Jerome N. Frank, Hon. John M. Harlan, Circuit Judges.

UNITED STATES EX REL. JOSEPH ACCARDI, RELATOR-APPELLANT

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION, ETC., RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript

of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. DANIEL FUSARO,
Clerk.

Filed January 7, 1955.

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